IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

FRIDAY, THE 5TH OCTOBER 2007 / 13TH ASWINA 1929

SA.No. 348 of 1993()

AS.65/1987 of SUB COURT, TIRUR
OS.281/1983 of M.C.,PARAPPANANGADI
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APPELLANTS:RESPONDENTS 1,3 TO 5:PLAINTIFFS:

***1. MATHILANCHERI AYYAPPAN,**
S/O.VELAYUDHAN, AGED 70 YEARS,
RESIDING AT THENHIPALAM AMSOM
IN TIRUR. (D I E D) – LR'S IMPLEADED:

2. MATHILANCHERI CHERIYA ARUMUGHAN,
S/O.VELAYUDHAN, AGED 44 YEARS,
RESIDING AT THENHIPALAM AMSOM IN TIRUR.

3. MATHILANCHERI VELAYUDHAN,
S/O.ARUMUGHAN, AGED 53 YEARS,
RESIDING AT THENHIPALAM AMSOM IN TIRUR.

4. MATHILACHERI VELAYUDHAN,
S/O.MATHILANCHERI NAYADI, AGED 54 YEARS,
RESIDING AT THENHIPALAM AMSOM IN TIRUR.

***ADDL.A5 IS IMPLEADED:**

A5. VELAYUDHAN, AGED 68 YEARS,
S/O,MATHILANCHERI AYYAPPAN,
RESIDING IN THANNISSERI HOUSE, THENHIPPALAM,
MALAPPURAM DISTRICT.

(*THE LEGAL REPRESENTATIVE OF DECEASED 1ST APPELLANT IS IMPLEADED AS ADDITIONAL 5TH APPELLANT AS PER ORDER DTD. 5/07/2007 IN I.A.2575/06)

BY ADV. SMT.PRABHA R.MENON.
SRI.T.SETHUMADHAVAN)
SRI.KODOTH PUSHPARAJAN) for Addl.A5

S.A.NO.348/1993

RESPONDENT:APPELLANT:DEFENDANT:
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* MATHILANCHERI THEYYAN,
S/O.VELAYUDHAN, AGED 67 YEARS,
RESIDING AT THENHIPALAM AMSOM
IN TIRUR TALUK - (D I E D) – LR'S IMPLEADED:

*ADDL.R2 IS IMPLEADED:

R2. MATHILANCHERI VENUGOPALAN,
S/O.LATE THEYYAN, AGED 35 YEARS,
KANNARI HOUSE, P.O.CHENABHALANGADI,
THENHIPALAM, MALAPPURAM DISTRICT.

(*THE SOLE LEGAL REPRESENTATIVE OF DECEASED RESPONDENT
IS IMPLEADED AS ADDITIONAL 2ND RESPONDENT AS PER
ORDER DTD. 17/06/04 IN C.M.P.NO.419/96)

BY ADV. SRI.K.RAMACHANDRAN)
SRI.M.RAMKUMAR) for R2
SRI.M.KRISHNAKUMAR
SMT MEENA
SMT PREETHY KARUNAKARAN

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD
ON 05/10/2007, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

KSS

M.SASIDHARAN NAMBIAR, J.

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S.A.No. 348 OF 1993

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DATED THIS THE 5th DAY OF OCTOBER, 2007

JUDGMENT

Plaintiffs in O.S.281 of 1983 on the file of Munsiff Court, Parappanangadi are the appellants. Defendant is the respondent. Appellants instituted the suit seeking a decree for permanent prohibitory injunction restraining respondent from trespassing into the plaint schedule property or adding a portion of the plaint schedule property into the property of respondent. The plaint schedule property originally belonged to the family of appellants and respondent. Respondent is the brother of appellants. Under Ext.A1 partition deed, in 1966, the joint properties were divided. D schedule property therein was alloted to the respondent. The property included in N schedule was kept common, providing that it is to be managed by the sons, appellants and respondent. It was specifically provided that the income from the N schedule property is to be utilised for the purpose of the temple and if there is any excess income, it is to be utilised for acquiring property to the temple and if the income is less, the balance expenses are to be met by sons equally. It also provides that if any of the sons die, the eldest

male member of that son should be co-opted for managing the property along with others. The suit was filed contending that plaint schedule property is the property set apart as N schedule under Ext.A1 and respondent has no right to encroach upon any portion of that property or to add it to his property. It was contended that in the plaint schedule property, there are three temples and respondent has no right to encroach upon the temple property and therefore he is to be restrained by a permanent prohibitory injunction.

2. Respondent, in his written statement contended that plaint schedule property takes in a portion of the property alloted to him under D schedule and therefore appellants are not entitled to the decree sought for. It was also contended that there was only one temple and the other two structures are constructed by him and they are not temples but tharaas and therefore appellants are not entitled to the decree sought for.

3. Learned Munsiff, on the evidence of PWs 1 to 7, DW1 & Ext.A1, holding that the survey number and the boundaries in Ext.A1 are not correct and plaint schedule property was fixed as shown by the Commissioner in Ext.C5 plan and granted a decree for permanent prohibitory injunction. It was found that there are

three temples in the plaint schedule property which was constructed by Velayudhan, father of appellants and respondent. Respondent challenged the decree and judgment before Sub Court, Tirur in A.S.65 of 1987. Learned Sub Judge, on reappreciation of evidence, found that the dispute is actually with regard to the exact identity of the property set apart as “N” schedule under Ext.A1 and “D” schedule, the property alloted to respondent. It was found that without fixing the boundary, the actual identity of the plaint schedule property cannot be fixed and trial court was not justified in granting a decree for injunction. The appeal was allowed. The decree was set aside. It was also held that appellants are entitled to file a suit for fixation of the boundary separating the plaint schedule property from the property of respondent. It is challenged in the second appeal.

4. Though notice was ordered in the second appeal and respondent appeared, no substantial question of law was formulated at that time.

5. Learned counsel appearing for appellants and respondent were heard. The argument of the learned counsel appearing for appellants is that the actual dispute between the parties is whether the two other structures, which the appellants

claim as temples and respondent claim as tharaas, form part of the temple kept as common under N schedule and this aspect was considered by the trial court in the light of evidence and first appellate court did not appreciate the evidence in the proper perspective and therefore the decree of first appellate court is unsustainable. It was argued that when the survey number and the boundaries and kole measurements shown in Ext.A1 are not helpful to fix the property, trial court rightly fixed the property covered under N schedule and granted a decree and first appellate court was not justified in interfering with the decree for the reason that boundaries were not fixed.

6. Learned counsel appearing for respondent pointed out that suit is only one for injunction and no declaration that the tharaas form part of the temple was sought for and the decree for injunction was sought on the ground that plaint schedule property is the property alloted as N schedule under Ext.A1 and unless that property is fixed, no decree for injunction could be granted. It was also pointed out that when one property was divided into two and northern plot was alloted to respondent and southern plot was kept common as N schedule, without fixing the properties covered under D schedule and N schedule, no decree

for injunction could be granted, especially when the dispute is with regard to the exact boundary separating the properties. It is therefore argued that appeal is only to be dismissed.

7. On hearing the learned counsel appearing for both sides, I do not find any reason to interfere with the findings of first appellate court that without fixing the boundary separating the properties of respondent alloted as D schedule and property kept common as N schedule, a decree for injunction cannot be granted. In a suit for injunction, the right or title to the disputed tharaas cannot be fixed. Though trial court entered a finding on the question whether the tharaas form part of the temple that was not the question to be settled in the suit.

8. The suit itself was based on the assumption that plaint schedule property is the property kept common and alloted as N schedule. There is no case in the plaint that either the boundaries, survey number or kole measurements shown in Ext.A1 are wrong and therefore N schedule property cannot be fixed with reference to the boundaries, survey number or kole measurements. Therefore for the reason that plaint schedule property does not tally with the kole measurements or boundaries shown in Ext.A1, it is not possible to grant a decree

for injunction.

9. When dispute between the parties is with regard to the exact boundary separating the properties alloted as schedule D and N, a decree for permanent prohibitory injunction could be granted only after fixing the respective properties. It is in such circumstances, first appellate court set aside the decree granted by the trial court and left open the question to be decided in an appropriate suit. In the light of the scope of the suit and evidence, I do not find that any substantial question of law involved in the appeal. Appellants are at liberty to institute an appropriate suit, for declaration of title to the disputed tharaas on the basis that they form part of the temple kept common under N schedule and to fix the boundaries.

Appeal is dismissed.

M.SASIDHARAN NAMBIAR, JUDGE

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